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No. 00-1057

In the Supreme Court of the United States

JAMES BEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly admitted at petitioner's trial, pursuant to Federal Rule of Evidence 803(3), a co-defendant's out-of-court statement of his intent to perform a certain act.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 219 F.3d 192. The opinion of the district court (Pet. App. 18a-33a) is reported at 70 F. Supp. 2d 129.

JURISDICTION

The judgment of the court of appeals was entered on July 25, 2000. A petition for rehearing was denied on September 19, 2000 (Pet. App. 35a). The petition for a writ of certiorari was filed on December 18, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of New York, petitioner was convicted of aiding and abetting a major fraud against the United States, in violation of 18 U.S.C. 1031 and 2. Petitioner was sentenced to a three-year term of probation, to include eight months of home detention. The court of appeals affirmed. Pet. App. 1a-17a.

1. Petitioner and co-defendant Jerome Maciejewski were senior executives of WholeHealth Insurance Network (WIN), a private health insurance company with divisions in Buffalo, Albany, and Binghamton, New York. WIN also processed certain Medicare claims pursuant to a contract with the United States Health Care Financing Administration (HCFA). HCFA reimbursed WIN for the administrative costs of processing those claims, but it prohibited WIN from using Medicare funds to pay for expenses incurred in the operation of WIN's private insurance business. Gov't C.A. Br. 4-5. The indictment in this case charged Maciejewski with six counts of causing fraudulent claims to be submitted to HCFA, and charged petitioner with one count of aiding and abetting the submission of fraudulent claims. Petitioner and Maciejewski were tried jointly and convicted on all counts.

The evidence at trial established that, in 1992, petitioner was a Senior Vice President of WIN and the Chief Operating Officer of the Albany Division. Maciejewski was a Senior Vice President and Chief Operating Officer of the Binghamton Division. In April 1992, Maciejewski was promoted to Chief Operating Officer of the entire company. WIN's Albany and Buffalo divisions were involved primarily in the private

health insurance business. The Binghamton division was involved exclusively in processing Medicare claims. Each of the three divisions had a "professional relations" department that served as a liaison between the company and health care providers. Professional relations employees in the Binghamton division were specially trained in Medicare rules and procedures. Professional relations employees in the Albany and Buffalo divisions were not trained to do Medicare-related work, and they did no such work. Pet. App. 3a; Gov't C.A. Br. 4-6.

In 1992, WIN was in serious financial difficulty. When Maciejewski was promoted to Chief Operating Officer of the entire company in April 1992, he moved to cut corporate costs and sought other sources of funds, including increased payments from HCFA. In early May 1992, Maciejewski met privately with Robert Gastle, an employee in WIN's finance department who was responsible for the Medicare budgeting and reporting process. Maciejewski instructed Gastle to inform David Voss, the company's vice president of finance, that Maciejewski wanted Voss to allocate 50% of the costs of Buffalo's professional relations department to Medicare, and to make that allocation retroactive to January 1992. As a result of that change, the Buffalo division would receive more money from HCFA, which would help fund WIN's non-Medicare expenses. Maciejewski said that he would have the Buffalo professional relations employees start distributing Medicare materials to justify the allocation. Pet. App. 3a-4a; Gov't C.A. Br. 5-7.

Gastle relayed Maciejewski's instructions to Voss, but Voss refused to implement the allocation without written instructions. Although Maciejewski expressed displeasure at Voss's response, Maciejewski had his

executive secretary type and initial a memorandum to Voss on May 6, 1992. The memorandum was backdated to February 3, 1992, and it stated:

> As you know, we have recently discussed the Professional Relations (PR) activity that Buffalo is performing for our Medicare division. With this in mind, it seems reasonable to allocate 50 percent of the PR cost centers to the Medicare division. This activity was reinstituted on January 1, 1992, therefore, this allocation should be retroactive to that date. If you have any questions, please contact me.

Pet. App. 4a-5a. On June 3, 1992, Voss received the memorandum. *Id.* at 4a.

When Gastle reported Voss's response to Maciejewski, Maciejewski said that "he would call Albany and talk to Jim and take care of it with the Albany division." Pet. App. 5a. "Jim" was petitioner James Best; he and Maciejewski were friends. On or about May 13, 1992, petitioner and Maciejewski attended a series of meetings together in Albany. Sometime between May 13 and May 15, petitioner had his executive secretary type and initial the following memorandum to Voss:

> Per this morning's conversation, please make the necessary adjustment in the cost allocation system to properly credit this department for its Medicare involvement. Since the first of the year, Jerry Maciejewski has asked us to assist the Medicare B Operation by having our Professional Relations Representatives disseminate various medicare information to our providers when they are making routine provider contacts and calls.

> Therefore, would you please allocate 50% of the Department to the Binghamton Division retroactive to January 1, 1992.

Id. at 5a-6a. That memorandum was backdated to February 18, 1992, and Voss received it on May 15, 1992. *Id.* at 5a.

Neither Maciejewski nor petitioner ever instructed the Albany or Buffalo professional relations departments to do any Medicare-related work in 1992, and neither of those departments in fact did any such work. As a result of the cost allocations ordered by Maciejewski and petitioner, however, Medicare paid nearly $460,000 in non-reimbursable private insurance professional relations costs. Almost $165,000 of that sum went to the Albany division. Pet. App. 6a; Gov't C.A. Br. 9-10.

Petitioner testified in his own defense. He admitted that he had his secretary type and initial the memorandum to Voss in the second week of May 1992. Petitioner denied, however, having any discussions with Maciejewski about the memorandum or about the allocation of professional relations costs. He claimed instead that Voss had instructed him to write the memorandum, and that Voss had dictated its contents and told petitioner to backdate it. Petitioner claimed that, based on what Voss had told him, he believed when he wrote the memorandum that the professional relations employees in Albany were actually doing Medicare work. On cross-examination, however, petitioner conceded that he was senior to Voss in the company hierarchy, that Voss (who worked in Buffalo) had nothing to do with the Albany professional relations department's dissemination of Medicare information, and that the supervisors of that department

reported to petitioner, not to Voss. Pet. App. 6a; Gov't C.A. Br. 11-12.

2. Before trial the government informed defense counsel that it would seek to introduce Gastle's testimony that Maciejewski said he would "call Albany and talk to Jim [Best] and take care of it [the allocation of private insurance professional relations costs to Medicare] with the Albany division." Gov't C.A. Br. 16. The government argued that the testimony was admissible under Federal Rule of Evidence 803(3) as a statement of Maciejewski's then-existing intent.[1] Petitioner objected, arguing that a declarant's stated intent to perform a future act can only be admitted to prove the conduct of a nondeclarant when there is independent evidence corroborating that the act was performed. Petitioner contended that such evidence was absent in this case. The government responded that Maciejewski's statement was admissible against petitioner not to prove any conduct by petitioner, but as evidence tending to prove that Maciejewski had acted in accordance with his expressed intent. The government also argued that, in any event, petitioner's memorandum to Voss provided the necessary corro-

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[1] Rule 803 enumerates various exceptions to the hearsay rule, including the following:

> (3)**Then existing mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Fed. R. Evid. 803(3).

boration that Maciejewski had indeed contacted petitioner. See Pet. App. 7a-8a.

The trial court reserved decision, and then held during the trial that the statement was admissible. The court concluded that Maciejewski's stated intent to contact petitioner was sufficiently corroborated by the fact that petitioner's memorandum to Voss was substantially the same as Maciejewski's memorandum and was created shortly after Maciejewski told Gastle that he intended to contact petitioner. Pet. App. 8a.

3. The court of appeals affirmed. Pet. App. 1a-17a. The court noted that, under Rule 803(3), a declarant's out-of-court statement of intent to perform a certain act in the future may, if relevant, be introduced "to prove that the declarant thereafter acted in accordance with the stated intent." *Id.* at 9a (citing *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285, 295-296 (1892), and Fed. R. Evid. 803 advisory committee's note to para. (3)). Citing several of its own prior decisions, the court further explained that such a statement may also be introduced against someone other than the declarant if there is "independent evidence that connect[s] the declarant's statement with the non-declarant's activities." Pet. App. 9a.

The court of appeals held that in this case there was "ample independent proof" that Maciejewski, after making his statement, asked petitioner to prepare a Medicare reallocation memorandum for the Albany division. Pet. App. 11a. The court noted that Maciejewski met with petitioner shortly after telling Gastle that he would ask petitioner to take care of the Albany allocation; that petitioner immediately thereafter wrote his memorandum to Voss; and that petitioner's memorandum "was in substance identical to the memorandum written by Maciejewski." *Ibid.* Accordingly,

the court concluded, petitioner's conduct "was proven not by Maciejewski's statement of what he would ask [petitioner] to do, but rather by the direct evidence of what [petitioner] did. We see no error in the district court's admission of Maciejewski's statement against [petitioner]." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 8-10) that this Court should grant certiorari to resolve conflicts within the circuits on two questions: (1) whether, under Federal Rule of Evidence 803(3), a declarant's statement of intent may ever be introduced to prove the subsequent conduct of a non-declarant, and (2) if so, whether independent evidence connecting the hearsay statement with the non-declarant's conduct is a prerequisite for admissibility. Neither question is presented in this case and certiorari is therefore not warranted. Both the district court and the court of appeals correctly determined that Maciejewski's statement was properly admitted under Rule 803(3), and there is no conflict among the circuits on the admissibility of an out-of-court statement of intent in circumstances like those presented here.

1. Federal Rule of Evidence 803 enumerates various exceptions to the general bar on the admission of hearsay in federal trials. Rule 803(3) permits the introduction of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." The Rule codifies the "state of mind" hearsay exception long recognized in the common law.

In *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892), this Court held that a declarant's out-of-court statement of intent to perform an act was ad-

missible as proof of his subsequent conduct. In that case, widow Sallie Hillmon brought a civil suit to collect on life insurance policies held by her husband, who allegedly died at a campsite at Crooked Creek, Kansas. The defendant insurance companies contended that the body found at Crooked Creek was the body of one Frederick Walters, not of John Hillmon. The defendants sought to introduce evidence that, shortly before the body was discovered, Walters had told two people that he planned to leave Wichita shortly and travel west with Hillmon. The Court held that the evidence was competent and relevant, and should have been admitted:

> The evidence that Walters was at Wichita on or before March 5th, and had not been heard from since, together with the evidence to identify as his the body found at Crooked creek on March 18th, tended to show that he went from Wichita to Crooked creek between those dates. Evidence that just before March 5th he had the intention of leaving Wichita with Hillmon would tend to corroborate the evidence already admitted, and to show that he went from Wichita to Crooked creek with Hillmon.

145 U.S. at 294-295. The Court further reasoned that the proposed evidence was competent not "as proof that [Walters] actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention." *Id.* at 296. See also *id.* at 295 ("whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be

proved by contemporaneous oral or written declarations of the party").

2. Petitioner states that the trial court erred in admitting testimony that Maciejewski said he intended to call petitioner and "take care of" the Medicare allocation issue with the Albany division. Pet. ii. Petitioner argues that neither Rule 803(3) nor *Hillmon* authorizes the admission of a declarant's hearsay statement of intent against a third party in order to prove that party's subsequent conduct. See, *e.g.*, Pet. 6, 7, 10-13.

Petitioner's argument rests on a fundamentally flawed premise. Maciejewski's statement was not admitted to prove petitioner's subsequent conduct. It was admitted only because of its tendency to show Maciejewski's own subsequent conduct, *i.e.*, that "Maciejewski called [petitioner] as he told Gastle he would." Pet. C.A. App. 35. Petitioner's own conduct was essentially undisputed at trial. The government contended that petitioner sent a memorandum to David Voss instructing Voss to allocate 50% of Albany's professional relations costs to Medicare; the government offered that memorandum into evidence; and petitioner admitted that he directed his secretary to type it and send it to Voss. Thus, Maciejewski's statement that he intended to have petitioner "take care of" the Medicare allocation problem for the Albany division was not necessary to prove that petitioner did just that. The memorandum itself, along with petitioner's admissions, were ample proof of petitioner's conduct.

The government offered Maciejewski's statement only as proof that Maciejewski likely acted on his declared intention and contacted petitioner. That evidence was relevant because it tended to show that petitioner wrote the allocation memorandum at Macie-

jewski's direction or request, rather than at Voss's direction as petitioner claimed. Put another way, the evidence tended to show the *motive* for petitioner's conduct, although it did not prove (and was not offered to prove) the conduct itself.[2]

3. Contrary to petitioner's assertion (Pet. 9), there is wide agreement among the courts of appeals that hearsay statements of intent are admissible in circumstances like those presented here. For example, in *United States* v. *Jenkins*, 579 F.2d 840 (4th Cir.), cert. denied, 439 U.S. 967 (1978), defendant Jenkins and "Miss B" were observed late one evening outside the

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[2] The prosecutor's discussion of Maciejewski's statement in summation demonstrates the limited purpose for which the statement was offered. See Pet. C.A. App. 103-104 ("The second thing [Maciejewski] says, very significant, is I'll contact Jim in Albany to take care of it. * * * Now, there's no direct evidence in this case that Maciejewski picked up the phone and called [petitioner]. We know that Maciejewski told Gastle he would. We don't have evidence he actually did it but we do know * * * within a day or two of the time that [petitioner] actually issues this memo, he and Maciejewski were together in Albany. They were together on the 13, 14, 15 of May in 1992, exactly the time [petitioner] was having his secretary generate that memo."); *id.* at 107 ("Maciejewski and [petitioner] have tried as hard as they possibly can to blame David Voss for these memos. * * * They want you to believe that there was never any communication about these memos between [petitioner] and Maciejewski, even though Gastle told you that Maciejewski had told him I'll contact [petitioner] to take care of Albany."); *id.* at 110 ("[Maciejewski] says I'll call Jim to take care of Albany. There is no direct evidence that telephone call was ever made. But that doesn't mean it's fiction or speculation. Why not? Let's look at the circumstantial evidence. One, Maciejewski said he was going to do it. Our common experience tells us when somebody wants something to be done, Maciejewski wanted the PR allocation to be done, and they say they're going to do something, they then do it.").

residence of one Lyles. Jenkins was charged with perjury based on his statements to a grand jury about the reason for his presence at that location. The trial court admitted evidence that, earlier on the evening in question, "Miss B" had a phone conversation with Lyles in which she stated that she would meet Lyles at his house within an hour. The court of appeals affirmed, holding that the evidence was admissible under Rule 803(3)

> to apprise the jury of "Miss B's" state of mind—her *knowledge* that Lyles was waiting to complete a transaction with her and her *intention* to go to meet him. Given this knowledge and intention, the jury might reasonably infer, *from the fact that* ["Miss B"] *and Jenkins appeared at Lyles' residence very shortly thereafter*, that Jenkins drove there because ["Miss B"] had asked him to do so. If the jury reached this conclusion, it could properly conclude that Jenkins had lied about his reason for making the trip.

Id. at 842. As in this case, the evidence of Miss B's state of mind was not offered to prove the defendant's conduct, for "substantial independent evidence was introduced" to prove that Jenkins drove Miss B to Lyles' residence. *Id.* at 843. The evidence instead was admissible for its tendency, through a chain of inferences, "to show *why* Jenkins behaved as he did." *Id.* at 844.[3]

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[3] Petitioner therefore errs in asserting (Pet. 9) that the Fourth Circuit does not permit evidence of a declarant's out-of-court statement of future intent to be admitted against a non-declarant. Moreover, petitioner's reliance (*ibid.*) on a footnote in *Gual Morales* v. *Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978), also does not support his claim of a circuit conflict. The language

At least three other circuits have upheld the admission of state of mind evidence under Rule 803(3) in similar circumstances. In *United States* v. *Donley*, 878 F.2d 735 (3d Cir. 1989), cert. denied, 494 U.S. 1058 (1990), the defendant admitted killing his wife, but claimed that he did so in the heat of passion after finding her with another man. The trial court admitted testimony that, just before her death, the wife had told the defendant that she planned to move out of their home and obtain a separation. See *id.* at 737. The court of appeals affirmed, holding that

> [t]he testimony went not to show that the defendant was soon to kill the declarant, but, rather, to show the existence of the deceased's plan to move out of the base apartment and separate from her husband. The government properly sought to persuade the jury to infer from her statements that she had such a plan and, in turn, to infer from that plan and the defendant's awareness of it that he had a motive for murder other than the one he claimed.

Id. at 737-738. See also *United States* v. *Astorga-Torres*, 682 F.2d 1331, 1335-1336 (9th Cir.) (drug dealer's statement to undercover agents that he intended to bring someone to guard him during a drug transaction held admissible as tending to prove that he did so and permitting jury to infer that appellants' presence at drug transaction was not innocent), cert. denied, 459 U.S. 1040 (1982); *United States* v. *Calvert*, 523 F.2d 895, 910 (8th Cir. 1975) (widow testifies that her husband had said he intended to speak with the

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cited by petitioner is dicta and we have found no other First Circuit case holding or suggesting that Rule 803(3) does not permit a statement of intent to be admitted against a non-declarant where the statement is relevant to prove a disputed issue.

defendant about ending their partnership and canceling their insurance policies; testimony properly admitted to show that deceased had likely acted in conformity with his intention, which would "establish the immediate motivation" for defendant's effort to arrange quickly for the deceased's murder), cert. denied, 424 U.S. 911 (1976).

Because there was no dispute about what petitioner *did* in this case (*i.e.*, causing an allocation memorandum to be sent to Voss), petitioner errs in relying (see Pet. 9) on cases in which a declarant's statement of intent is offered to prove the conduct of a non-declarant. In *United States* v. *Delvecchio*, 816 F.2d 859 (2d Cir. 1987), for example, an informant told law enforcement agents that he intended to meet with Amen and Delvecchio on a certain date. The agents conducted surveillance and saw the informant meet with Amen, while a third individual—whom the agents could not see clearly—remained seated in the car. *Id.* at 861. The Second Circuit held that it was error to admit the informant's out-of-court statement of intent as proof that Delvecchio attended the meeting, in the absence of any other evidence to suggest that he did so. *Id.* at 862-863. Here, however, the out-of-court statement was not admitted to prove what a non-declarant did. Accordingly, even if petitioner is correct (Pet. 9) that the courts of appeals are divided on the question whether independent evidence connecting the declarant's statement with the non-declarant's conduct is a prerequisite for admitting the statement to prove that conduct, that issue is not implicated in this case. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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